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Constitutional Law-Double Jeopardy-Identity of Offenses

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Constitutional law—Double Jeopardy—Identity of Offenses.—Defendant was first tried and convicted in municipal court upon an affidavit charging the misdemeanor of transporting intoxicating liquors under section 2717, Burns 1926. To an affidavit filed later in circuit court charging him with transporting intoxicating liquor in an automobile, a felony under section 2720, Burns 1926, defendant pleaded the former conviction. Held, the plea of former jeopardy as a bar to the second prosecution was sustained, as the proof of facts necessary to convict on the second prosecution would necessarily have convicted on the first.¹

That no one shall be twice put in jeopardy is an ancient and well established doctrine that is found embodied in the Constitution of the United States,² as well as the constitutions of nearly all of the states, including Indiana.³ The defense is available only in criminal actions, and is not permitted where there has been a former suit in rem for the forfeiture of property,⁴ nor is the fact that the defendant has been convicted of a crime a bar to the assessment of punitive damages in a civil suit,⁵ although Indiana and a few other jurisdictions refuse to allow punitive damages where the tort sued on is also a crime.⁶

There are three requirements each of which must be met before the defense of double jeopardy is available. First, the defendant must have been in actual jeopardy. Thus, it has been held that where the indictment in the first trial would not support a conviction,⁷ or when the defendant was tried by a court having no jurisdiction,⁸ there was no legal jeopardy.

There are a few courts which hold that jeopardy does not attach until a valid verdict has been rendered,⁹ but the great majority of the courts hold that jeopardy attaches when the jury has been impaneled and sworn.¹⁰

¹ *Arrol v. State* (1934), 192 N. E. 440 (Ind.).

² Article 5, section 29, Constitution of United States.

³ Article 1, section 15, Constitution of Indiana.

⁴ *Origet v. U. S.* (1887), 125 U. S. 240, 31 L. ed. 743; *The Palmyra* (1827), 12 Wheat. 1, 6 L. ed. 531; *State v. Barrels of Liquor* (1867), 47 N. H. 369.

⁵ *Brown v. Evans* (1883), 17 F. 912; *Hendrickson v. Kingsbury* (1866), 21 Ia. 379; *Shevlier-Carpenter Co. v. Minnesota* (1910), 218 U. S. 57, 54 L. ed. 930; *Bundy v. Maginess* (1888), 76 Cal. 432, 18 Pac. 688; *Boetcher v. Staples* (1880), 27 Minn. 308, 7 N. W. 263; *Johnson v. Smith* (1875), 64 Me. 553; *Corcoran v. Harran* (1882), 55 Wis. 120, 12 N. W. 468.

⁶ *Taber v. Hutson* (1854), 5 Ind. 322; *Farman v. Lauman* (1881), 73 Ind. 568; *Wabash Printing and Publishing Co. v. Crumrine* (1889), 123 Ind. 89, 21 N. E. 904; *State v. Stevens* (1885), 103 Ind. 55, 2 N. E. 214; *Austin v. Wilson* (1849), 58 Mass. 273; *Murphy v. Hobbs* (1884), 7 Colo. 541, 5 Pac. 119.

⁷ *Blocher v. State* (1912), 177 Ind. 356, 98 N. E. 118; *Joy v. State* (1860), 14 Ind. 139; *Hensley v. State* (1886), 107 Ind. 587, 8 N. E. 692; *Miller v. State* (1904), 33 Ind. App. 509, 71 N. E. 248; *Ex parte Winston* (1875), 52 Ala. 419; *Brown v. State* (1900), 109 Ga. 570, 34 S. E. 1031; *Conley v. State* (1890), 85 Ga. 348, 11 S. E. 659; *Sims v. State* (1906), 146 Ala. 109, 41 So. 413; *People v. Ammerman* (1897), 118 Cal. 23, 50 Pac. 15; *Hodges v. Commonwealth* (1923), 198 Ky. 652, 249 S. W. 774; *United States v. Jones* (1887), 31 F. 725.

⁸ *State v. Odell* (1836), 4 Blackf. 156; *O'Brien v. State* (1859), 12 Ind. 369; *State v. Morgan* (1878), 62 Ind. 35; *Siebert v. State* (1884), 95 Ind. 471; *Commonwealth v. Peters* (1847), 53 Mass. 387; *Pittman v. State* (1922), 18 Ala. App. 477, 93 So. 42; *McNeil v. State* (1890), 29 Tex. App. 48, 14 S. W. 393; *State v. Newel* (1916), 172 N. C. 933, 90 S. E. 594; *State v. Fox* (1910), 83 Conn. 268, 76 A. 302.

⁹ *U. S. v. Gibert* (1834), 25 Fed. Cas. No. 15, 205, 2 Sumn. 19; *U. S. v. Haskell* (1823), 26 Fed. Cas. No. 15, 321, 2 Wheeler Cr. Cas. 101; *Hoffman v. State* (1863), 20 Md. 425; *State v. Elden* (1856), 41 Me. 165; *Anderson v. State* (1897), 86 Md. 479, 38 A. 937.

¹⁰ *Sanders v. State* (1883), 85 Ind. 318; *Haase v. State* (1893), 8 Ind. App. 488, 36 N. E. 54; *Paul v. Benzie Circuit Judge* (1910), 163 Mich. 543, 128 N. W. 739; *State v. Webster* (1907), 206 Mo. 558, 105 S. W. 705; *Burnes v. State* (1925), 89 Fla. 494, 104 So. 783; *State v. B.* (1921), 173 Wis. 608, 182 N. W. 474; *McFadden v. Commonwealth* (1853), 23 Pa. St. 12; *Nolan v. State* (1875), 55 Ga. 521; *Murray*

If, however, under the majority rule, the jury fails to agree upon a verdict,¹¹ or there is a mistrial due to the illness or death of the judge,¹² or of a juror,¹³ or if the jury are discharged before verdict with the consent of the defendant,¹⁴ or the term of court comes to an end before the trial is finished,¹⁵ or if, after conviction, the verdict has been set aside on his motion,¹⁶ the courts have held that the proceedings do not constitute legal jeopardy.

Second, the second prosecution must be in the same jurisdiction as the first. Thus if the same act is an offense under both federal and state laws, the accused may be prosecuted under both,¹⁷ and the same conclusion is generally reached when the act is in violation of a municipal ordinance and a state law.¹⁸ However, basing their reasoning on the theory that the municipality is but a part of the state and derives its authority from it, some few courts have adopted the seemingly preferable rule that the accused cannot be twice prosecuted for an act which is in violation of a state law and a municipal ordinance.¹⁹

Third, the second prosecution must be for the same offense as the first. The test almost universally applied by the courts in determining what constitutes the "same offense," as it is used in this connection is that if there might have been a conviction at the first trial on the proof of facts which would be necessary to convict on the second trial, then there is such prosecution for the same offense as will satisfy this requirement of double jeopardy.²⁰

v. State (1924), 210 Ala. 603, 98 So. 871; *State v. Brown* (1918), 135 Ark. 166, 204 S. W. 209.

¹¹ *State v. Walker* (1866), 26 Ind. 346; *Shaffer v. State* (1866), 27 Ind. 131; *State v. Larrimore* (1910), 173 Ind. 452, 90 N. E. 898; *United States v. Periz* (1824), 9 Wheat. 579, 6 L. ed. 165; *Commonwealth v. Cody* (1896), 165 Mass. 133, 42 N. E. 575; *People v. Schoeneth* (1880), 44 Mich. 489, 7 N. W. 70; *Dobbins v. State* (1863), 14 Ohio St. 493; *People v. James* (1893), 97 Cal. 400, 32 Pac. 317; *Bullock v. Hayes* (1915), 215 N. Y. 172, 109 N. E. 77.

¹² *Nugent v. State* (1833), 4 Stew. and P. 72; *State v. Varnado* (1909), 124 La. 711, 50 So. 661; *State v. Ulrich* (1892), 110 Mo. 350, 19 S. W. 656.

¹³ *Doles v. State* (1884), 97 Ind. 55; *People v. Ross* (1890), 85 Cal. 383, 24 P. 789; *Ellis v. State* (1889), 25 Fla. 702, 6 So. 768; *Commonwealth v. Merrill* (1823), 8 Allen 545; *State v. Emery* (1886), 59 Vt. 84, 7 A. 129; *Hilbert v. Commonwealth* (1899), 21 Ky. L. Rep. 537, 51 S. W. 817.

¹⁴ *State v. Wamire* (1861), 16 Ind. 357; *Mood v. State* (1924), 194 Ind. 357, 142 N. E. 641; *State v. Valconer* (1886), 70 Ia. 416, 30 N. W. 655; *People v. White* (1888), 68 Mich. 848, 37 N. W. 34; *State v. Davis* (1879), 80 N. C. 384; *Lewis v. State* (1899), 121 Ala. 1, 25 So. 1017.

¹⁵ *Lore v. State* (1842), 4 Ala. 173; *In re Scrafford* (1879), 21 Kan. 735; *State v. Jeffers* (1877), 64 Mo. 376.

¹⁶ *Joy v. State* (1860), 14 Ind. 139; *Floyd v. State* (1906), 80 Ark. 94, 96 S. W. 125; *State v. Balsley* (1902), 159 Ind. 395, 65 N. E. 185; *State v. Cross* (1897), 44 W. Va. 315; *Harvey v. State* (1901), 43 Tex. Cr. Rep. 271, 64 S. W. 1039; *People v. Burcham* (1924), 69 Cal. App. 614, 232 P. 149; *State v. Turco* (1923), 99 N. J. L. 96, 122 A. 844.

¹⁷ *Heier v. State* (1921), 191 Ind. 410, 133 N. E. 200; *Grafton v. United States* (1907), 206 U. S. 333, 51 L. ed. 1084; *State v. Rankin* (1867), 44 Tenn. 145; *Vandell v. United States* (1925), 6 F. (2d) 188; *State v. Holesapple* (1923), 92 W. Va. 645, 115 S. E. 794; *Fox v. Ohio* (1845), 5 How. 410; *United States v. Marigold* (1850), 9 How. 560.

¹⁸ *Levy v. State* (1855), 6 Ind. 281; *Thomas v. City of Indianapolis* (1924), 195 Ind. 440, 145 N. E. 550; *Hughes v. People* (1885), 8 Colo. 536, 9 Pac. 50; *McInney v. City of Denver* (1892), 17 Colo. 352, 29 P. 516; *Sutton v. City of Washington* (1908), 4 Ga. App. 30, 60 S. E. 811; *State v. Lee* (1882), 29 Minn. 445, 13 N. W. 913; *Koch v. State* (1895), 53 Ohio St. 433, 41 N. E. 689.

¹⁹ *State v. Cowan* (1860), 29 Mo. 330; *State v. Welch* (1869), 36 Conn. 215; *State v. Flint* (1893), 63 Conn. 248, 28 Atl. 28; *People v. Hanrahan* (1889), 75 Mich. 611, 42 N. W. 1124; 16 Cornell L. Q. 201.

²⁰ *Smith v. State* (1882), 85 Ind. 553; *Barker v. State* (1918), 188 Ind. 263, 120 N. E. 593; *Foran v. State* (1924), 195 Ind. 55, 144 N. E. 529; *Anderson v. State* (1918),

It may readily be seen that this test leads to difficulty in cases in which one act or transaction includes several offenses of different degrees. The courts, however, have generally shown no hesitancy in holding that a prosecution for one offense bars a subsequent prosecution for all offenses arising from the same transaction which are included therein, or in which it may be included.²¹

The question in the principal case as to whether or not a prosecution on an affidavit charging the transportation of intoxicating liquor, if carried to final judgment, would be a bar to a subsequent prosecution for transporting intoxicating liquor in an automobile was undoubtedly correctly decided, transporting liquor being an offense included in a charge of transporting liquor in an automobile.²² The language used by the court in applying the test of when a second prosecution would be barred is misleading. "When the facts necessary to convict on the second prosecution would necessarily have convicted on the first, a final judgment on the first will be a bar to the second." As pointed out before, it is not necessary for the prosecution to go to final judgment in order to jeopardize the accused, but jeopardy attaches when the jury is impaneled and sworn.

C. L. C.

Constitutional Law—Is a Justice of Peace Court an Impartial Tribunal.—

This was an appeal from a judgment rendered against appellant upon overruling his exceptions to appellees' return to a writ of habeas corpus. The writ of habeas corpus was granted and served upon appellee pursuant to appellant's petition in which he alleged that he was held by virtue of a commitment issued by appellee Minas, as justice of the peace. The commitment was founded upon a judgment for fine and costs against appellant in a criminal proceeding before said justice of the peace. In his petition for writ of habeas corpus, appellant alleged, among other things, that the judgment and commitment of appellee were illegal and void; urging that appellee, as justice of peace, was entitled to no pay for his services, unless appellant was convicted and paid his fine, and that under the Fourteenth Amendment to the Constitution of the United States, such a procedure deprived a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which had a direct, personal, pecuniary interest in reaching a conclusion against him. Held, that a judgment and commitment after trial in a criminal proceeding before a justice of peace was not void as denying due process.¹

The Constitution of Indiana provides that: "A competent number of justices of the peace shall be elected by the voters in each township in the several counties. They shall continue in office four years, and their powers and duties shall be prescribed by law."² It can readily be seen, therefore, that the Constitution of Indiana only provides for the office of justice of the peace, and that the extent of the powers and duties of such office has been

187 Ind. 94, 118 N. E. 567; Nordlinger v. United States (1904), 24 App. D. C. 406, 70 L. R. A. 227; O'Donnel v. People (1904), 211 Ill. 158, 71 N. E. 842; Commonwealth v. Roby (1832), 29 Mass. 496; Woods v. State (1916), 15 Ala. App. 251, 73 So. 129; Commonwealth v. Croft (1925), 208 Ky. 220, 270 S. W. 816; Duvall v. State (1924), 111 Ohio St. 657, 146 N. E. 90.

²¹ State v. Hattabaugh (1879), 66 Ind. 223; State v. Elder (1879), 65 Ind. 282; State v. Rosenbaum (1899), 23 Ind. App. 236, 55 N. E. 110; State v. Blevins (1902), 134 Ala. 213, 32 So. 637; Sanford v. State (1918), 75 Fla. 393, 78 So. 340; Schroeder v. United States (1925), 7 F. (2d) 60.

²² Bryant v. State (1933), 186 N. E. 322 (Ind.).

¹ Harding v. Minas (1934), — Ind. —, 190 N. E. 862.

² Section 14, Article 7 of the Constitution of Indiana.